MANJIT SINGH GURDIAL SINGH

v.

R. K. NATHAN

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. P 72 OF 1982]
11 JUNE 1984

TORT: *Professional negligence - Whether solicitor negligent in not pursuing the case within the 6-year limitation period.*

On 17 February 1973 the plaintiff met with an accident just after midnight along Jalan Parry, Ampang. The plaintiff's motor cycle fell into a drain and as a result of the injuries his lower limbs are now completely paralysed. He was warded in the General Hospital, Kuala Lumpur and moved to Ipoh to be nearer his parents. He was re-admitted into the General Hospital, Ipoh, and it was while there that he retained the services of Messrs. L. Fernandez & Co., a firm of solicitors in order to claim damages for his injuries. In July 1975 the plaintiff moved to Kuala Lumpur to be nearer his wife who was working there. He was then warded into the General Hospital, Kuala Lumpur again. While in the hospital he met one Kaneson who persuaded the plaintiff to appoint a solicitor in Kuala Lumpur to pursue his claim. Kaneson solicited the help of the defendant's brother who is a clerk of the defendant. After discussion in his office the defendant instructed his brother to see the plaintiff to obtain written consent for the medical report. The defendant then wrote to the General Hospital, Kuala Lumpur for the plaintiff's medical report and another letter to the plaintiff informing him of this fact and requesting him to call at his office to have a detailed statement of the accident recorded. The plaintiff failed to respond despite repeated reminders. The defendant treated the matter as closed and was subsequently informed by Kaneson that the plaintiff intended to revert to his former solicitors.

The plaintiff on the other hand claimed that the failure to respond was due to his physical disability and that he had already given a detailed statement to the defendant's clerk. He had assumed that the claim was being pursued until June 1981 when he wrote to the New Straits Times complaining about his plight. Mr. Sharma another solicitor who knew the plaintiff then filed an action against the defendant.

The main issues to be determined were:

(i) whether there was a valid and binding contract between the parties;

(ii) if so, whether there was a breach of it by the defendant;

(iii) whether the plaintiff had any legitimate claim on the accident against anyone and if not, whether the Bureau would have granted him any relief.

During the course of the hearing it became evident that at the time of the accident a police report had been lodged which stated that the plaintiff's motorcycle fell into a drain. There was no evidence that another vehicle was involved. This report effectively negated any claim from the Motor Insurance Bureau which compensated only hit-and-run victims on compassionate grounds.

Held:

[1] On the facts of the case and evidence given, there had been no binding contract between the plaintiff and the defendant.

[2] The plaintiff had no claim on the accident against anyone and there was no ground for the Bureau to entertain his claim.

[Action dismissed with costs.]

For the plaintiff - Sharma
For the defendant - R.R. Chelliah
For the Motor Insurance Bureau (watching brief) - Manjeet Singh

JUDGMENT

Siti Norma Yaakob J:

The facts leading to this cause of action happened in the following manner.

On 17 February 1973, just after midnight, the plaintiff met with an accident whilst driving his motor cycle along the stretch of the road in Ampang which was then known as Jalan Parry, and as a result of his injuries, his lower limbs are now completely paralysed. He was first warded at the General Hospital, Kuala Lumpur, until his discharge on 22 September 1973 and in early 1974, he moved to Ipoh to be nearer his parents. He was re-admitted into the General Hospital, Ipoh, and it was there in January 1975 that he seriously considered the possibility of claiming damages for his injuries and to that end, he retained the services of Messrs. L. Fernandez & Co., a firm of solicitors from Ipoh.

However, in July 1975, the plaintiff moved back to Kuala Lumpur to be nearer his wife (who was then working in Kuala Lumpur) and his children and he was warded into the General Hospital, Kuala Lumpur again where he remained for the next 2 to 3 months. From that time onwards, he had been in and out of the General Hospital, Kuala Lumpur, either as an in-patient or as an out-patient and since 1979, after his wife had got a transfer to Ipoh, he too moved back to Ipoh where he has been ever since.

When he was re-admitted as a patient to the General Hospital, Kuala Lumpur in July 1975, the plaintiff met a friend, Kaneson, PW5, a former employee of the hospital. In the course of conversation, PW5 persuaded the plaintiff that since he was now in Kuala Lumpur, he should engage a solicitor nearer at hand to handle his civil claim and he advised the plaintiff to discharge Messrs. L. Fernandez & Co. and recommended Messrs. R.K. Nathan & Co., the defendant's firm whom he claimed he was working for, to handle his case. The plaintiff was agreeable to this suggestion and from then onwards, PW5 acted as his agent in securing and instructing the defendant.

As the first step, PW5 met the defendant's brother, DW2, who works for the defendant as a clerk on 27 May 1976, at the hospital premises where the latter happened to be that day. Together they saw the defendant in his office the same day. After ascertaining his intention, the defendant instructed DW2 to see the plaintiff to obtain his written consent for the medical report. As there is conflicting evidence as to what actually transpired when DW2 met the plaintiff in hospital, I shall deal with the evidence of this later.

Anyway, following this visit, the defendant wrote two letters, both dated 4 June 1976. One, AB2, is addressed to the General Hospital, Kuala Lumpur requesting for the plaintiff's medical report and for this purpose enclosed the plaintiff's letter of consent together with a cheque for RM20 being the fee for the medical report, and the other, AB1, to the plaintiff directly

informing him of this fact as well as requesting him to call at his office to have his detailed statement of the accident recorded. When the defendant heard nothing from the plaintiff, he sent another letter dated 1 September 1976, D18, reminding the plaintiff that as he had failed to respond to AB1, he was giving him another 7 days to call at his office for the detailed statement, failing which, he, the defendant would treat the matter as closed. When the plaintiff did not again respond to D18, the defendant on his part did not give the matter any more thought especially when he was subsequently informed by PW5 that the plaintiff wished to revert to his former solicitors in Ipoh and as proof of this, handed a letter dated 5 May 1976, AB6, written by Mr. Fernandez. The defendant accordingly closed his file on the plaintiff and when he subsequently obtained the medical report pursuant to AB2, he thought no more of it and enclosed it together with AB6 in the plaintiff's file.

The plaintiff on the other hand claims that his failure to respond to AB1 and D18 was due to his immobility as it was physically impossible for him to have made the trip to the defendant's office and furthermore he had already given a detailed statement of the accident to DW2 when the latter visited him in hospital sometime in late 1976 or early 1977. Happy with the thought that matters were taking their own course and reassured by PW5 that his claim was in good hands, the plaintiff allowed time to pass until June 1981 when he realized that nothing had come out from his civil claim. He wrote to the New Straits Times complaining about his plight and presumably, if not directly, indirectly alluding to the defendant's dilatoriness and Mr. Sharma, his present solicitor, who knew him, responded to it, resulting in the present action being filed against the defendant claiming damages for professional negligence for not pursuing the plaintiff's case in obtaining any remedy available, particularly from the Motor Insurance Bureau (the Bureau), within the 6-year limitation period.

At the outset of the trial, both parties agreed to adduce evidence on liability first, reserving evidence on the quantum of damages claimed to a later date.

The main issues before me are (1) whether there is a valid and binding contract between the parties, (2) if so, whether there has been a breach of it by the defendant and (3) whether the plaintiff had any legitimate claim on the accident against anyone and if not, whether the Bureau would have granted him any relief.

In the course of dealing with these 3 issues, I shall also make reference to certain disputed facts that emerged during the trial which require to be established as I consider them to be very decisive in explaining the conduct of the parties to this action.

As the timing of events is very important to this case, I shall first of all start at the stage when the plaintiff decided to discharge Mr. Fernandez of Ipoh and engage the defendant instead as his solicitor. Following this, the plaintiff contacted Mr. Fernandez by telephone resulting in the latter sending the letter dated 5 May 1976, AB6, to the plaintiff and from para. 1 of this letter, it is clear that at the plaintiff's request, Mr. Fernandez enclosed a copy of the police report, D17. The plaintiff had testified that the purpose of him ringing Mr. Fernandez was to discharge the latter's services as he wished to engage the defendant but AB6, the only letter the plaintiff received from Mr. Fernandez, made no mention of this and neither can I gather from the tone of the letter that such a move was even contemplated. However, in subsequent communications with Mr. Sharma, Mr. Fernandez confirmed in AB10 that the plaintiff had discharged his services in the middle of May 1976 as he, the plaintiff, had engaged the defendant instead. Be that as it may, I find it very difficult to reconcile that intention with what is written in AB6. In AB6, Mr. Fernandez has clearly instructed the plaintiff to approach the Chief Police Officer, Selangor, discreetly and to try and obtain from him a report to the effect that he, the plaintiff, was a hit-and-run victim. It is not disputed that D17

is the only police report pertaining to the plaintiff's accident and it is also the first information report. It states that the plaintiff's motor cycle fell into a drain in Jalan Parry at 1.40 a.m. on 17 February 1973 and subsequent police evidence shows that no other vehicle was involved and that no further police investigations had been carried out as a result. To the Bureau, D17 would have a disastrous effect as far as the plaintiff is concerned for although it has a discretion to compensate hit-and-run victims on compassionate and humanitarian grounds that discretion can only be exercised if it can be established that such victims are *bona fide* hit-and-run-victims and for this purpose, police reports and other police investigations become very relevant. The Secretary to the Bureau, PW4, confirmed that the Bureau could not possibly have compensated the plaintiff based on what is stated in D17 and in fact did so confirm subsequently when the defendant made available all relevant documents to the Bureau. Knowing this, Mr. Fernandez must have made the infamous suggestion to the plaintiff that he should try to substitute D17 with another police report to the effect that the plaintiff was a hit-and-run victim so as to influence the Bureau to make an award in the plaintiff's favour. It was not therefore the gratuitous advice given by a solicitor to his client as Mr. Sharma wants me to hold but that it was given for the sole purpose of influencing the Bureau. Despite his avowed denial that he did not read D17 or that he knew what the instructions meant, I do not consider the plaintiff to be that naive as not to be able to appreciate the implication contained in the instructions. To begin with, he had specially asked for D17. He admitted that he had been advised by Mr. Fernandez that only the Bureau can compensate hit-and-run victims and some conversation over D17 must have taken place between him and Mr. Fernandez that had caused the plaintiff to have asked for the police report so that he could see for himself the penultimate statement that his motor cycle had fallen by itself into a drain. He did not appear to be particularly anxious to read his medical reports but was very concerned over D17. In all probability, Mr. Fernandez must have advised him that the Bureau could not possibly compensate him in view of that statement in D17 and considering all the circumstances of this case, this is the only logical conclusion that I can reach as to why Mr. Fernandez should have advised the plaintiff to approach the Chief Police Officer, Selangor discreetly.

Thus following the trend of events when PW5 saw the defendant in his office on 27 May 1976, the plaintiff was already in possession of AB6 which for certain included copy of D17. However, what is disputed is whether the plaintiff's medical reports were also enclosed with AB6 and whether the plaintiff handed AB6 and all its enclosures to the defendant through PW5 on 27 May 1976.

The plaintiff could not recall whether any medical report was enclosed in AB6 and neither was PW5 able to offer any assistance. As Mr. Fernandez himself was not called to testify in person, I have only his documentary evidence in AB6 to ascertain whether he did actually enclose "the relevant medical reports" that he speaks of in the last paragraph of his letter. From the tone of AB6, I can only conclude that only a copy of D17 was enclosed but not copies of the medical reports. My finding on this is further confirmed by Mr. Fernandez's subsequent letter dated 27 July 1981, AB10, written to Mr. Sharma wherein he enclosed the 2 pertinent medical reports. If these reports have been enclosed in AB6, Mr. Fernandez could not possibly have extended the very same documents to Mr. Sharma in July 1981.

Having established that AB6 enclosed only a copy of D17, I next consider when these two documents were handed to the defendant. According to the plaintiff, he handed them to PW5 immediately upon receipt as he was fully aware that they were necessary to enable the defendant to carry out his instructions and PW5 in turn handed them to the defendant when they met for first time in the latter's office on 27 May 1976. The defendant denies receiving

AB6 and D17 on that date, but recalled receiving AB6 in his office subsequently well after the expiry of the 7 days mentioned in his letter, D18, from somebody who identified himself as being a friend of the plaintiff. PW5 at first admitted that he remembered handing a letter which can only be AB6 to the defendant in his office on 27 May 1976. However, when cross-examined on this, he edged a little and denied delivering any letter to the defendant on 27 May 1976 and that he went to the defendant's office that day empty-handed. However, he remembered seeing the plaintiff hand a letter to DW2 that same day after the visit to the defendant's office. DW2 denies this and he must be speaking the truth as the plaintiff was very emphatic that firstly he gave AB6 and all the enclosures to PW5 and to no one else and secondly he was fully aware that the defendant needed these documents to prepare his case. Since he only saw DW2 for the first time after PW5 and DW2 had been to the defendant's office, it is therefore not possible for the plaintiff to have handed any document to DW2 before he, DW2, took PW5 to the defendant's office on 27 May 1976.

Although there is conflicting evidence, not only to the point of time when the plaintiff handed the documents to PW5, but also when PW5 actually handed them to the defendant, there is no doubt whatsoever that the plaintiff could not have handed the documents to any body but to PW5 who was after all his agent. However, as there is no conclusive proof that the documents were handed to PW5 on or before 27 May 1976 or that PW5 in turn handed them to the defendant on that date in his office, in all probability, PW5 must have handed them to the defendant on another occasion, which must be the occasion referred to by the defendant, i.e. sometime after the middle of September 1976, after he had despatched his own letter, D18, to the plaintiff and after the expiry of the 7 days mentioned in D18.

This also explains the defendant's action in writing AB2 wherein he had requested for a copy of the plaintiff's medical report from the hospital authorities. If he had already been handed AB6 by 4 June 1976, (the date of AB2), I cannot imagine why he should bother to write AB2 at all. As a member of the Bar, with 16 years' experience dealing principally in running down cases, receipt of AB6 would have prompted the defendant to inform PW5 on 27 May 1976 that he could not possibly act for the plaintiff so long as Mr. Fernandez was still on record as the plaintiff's solicitor and there was therefore no obligation on his part to do anything for the plaintiff, let alone write AB2 requesting for his medical report. Interestingly, the defendant received only AB6 and not D17 as well and I have no cause to doubt his evidence on this as the moment he became aware in June 1981, that something was amiss, he had dug out the plaintiff's file perused AB6 and straightway instructed DW2 to get a copy of D17, which is referred to as police report No. 10054/73 in AB6. However, as the correct number of D17 is 10554/73, the defendant had some difficulty in tracing D17 but what I wish to stress here is that his action could not possibly be of someone who has had a sight of D17 well before June 1981.

To go back to the events that occurred on 27 May 1976, I now come to consider another conflicting piece of evidence as to what actually transpired when the defendant sent DW2 and PW5 back to the hospital after they had seen him in his office. According to the defendant, he had sent his brother back to the hospital to see the plaintiff and obtain from him the necessary consent for the medical report to enable him to evaluate the extent of the plaintiff's injuries and to advise the plaintiff accordingly as to the next cause of action. The plaintiff testified that he affixed his thumb print to a document which DW2 produced before him, the nature of which he could not specifically say but that he maintains is the retainer to enable the defendant to act as his solicitor, the existence of which, legally establishes their contractual relationship. Both the defendant and DW2 maintain it was not a retainer as such but merely the plaintiff's written consent to enable the defendant to obtain the medical

report of the plaintiff's injuries from the hospital authorities. It must be remembered that at that stage, the defendant was only aware that there was a potential client, a victim of a motor accident who was anxious to retain his services with a view to obtaining a remedy for his injuries. Beyond that, the defendant knew nothing more of the plaintiff and it is also an accepted practice that for the hospital authorities to release any report concerning any patient, a written consent from the patient is necessary. The plaintiff is aware of this practice as he admitted that he had executed a similar consent with Mr. Fernandez when the latter wished to obtain a copy of his medical report. As such, I have my doubts over the plaintiff's uncertainty as to the document to which he readily affixed his thumb print and in all probability, that document can only be his written consent to enable the defendant to obtain his medical report, the very same document that was enclosed in AB2, together with the cheque of RM20 being the fees payable for the medical report. It could not possibly be the retainer declaring the intentions and obligations of either party as at that stage, the defendant was not yet in possession of all relevant facts and documents to be able to consider whether any remedy is available to the plaintiff let alone advice him of the course of action to be taken. Moreover, at that stage too, and for that matter, at no time was fees ever discussed. To establish a binding contract between the plaintiff and the defendant based on the relationship of client and solicitor, there must be consideration and in a relationship of this nature, that consideration can only be the fees payable by the plaintiff for services rendered by the defendant. It is not disputed that the plaintiff never discussed fees with the defendant as he never spoke or saw him, all instructions about pursuing his civil claim were conducted through PW5. The question of fees was also not brought up when PW5 saw the defendant for the first time on 27 May 1976 at the latter's office and neither has the defendant claimed any from the plaintiff when he decided to close his file failing to get any response to D18. In fact, he had been made poorer by RM20 as that was the amount he expended for the plaintiff's medical report.

As PW5 played a major role in trying to obtain the defendant's services and had acted all along as the plaintiff's agent, I shall now consider to what extent I can accept his evidence as a whole. I have already shown one instance where he has not been truthful in his evidence regarding the time when he had handed AB6 to the defendant. To the plaintiff, he had held himself out to be an employee of the defendant but yet he needed DW2's assistance to introduce him to the defendant. Although he had left the employment of the General Hospital, Kuala Lumpur in 1974, he appears to have spent his entire working hours at the hospital premises and at the trial when he was asked to state the nature of his occupation, he declared himself to be unemployed. From the manner in which he held himself out to the plaintiff and the part he played in trying to secure the defendant's services, I have no doubt whatsoever that he earned a livelihood as a tout at least during 1975 and 1976. Be that as it may, it does not naturally follow that he is not a witness of truth and I shall now consider some aspects of his evidence which shows him in his true light. He had admitted that he had been to the defendant's office only once but when cross-examined, he changed his story and admitted he made 3 trips altogether. The first occasion was on 27 May 1976 when he saw the defendant for the first time. The second occasion was when he brought DW2 from his office to the hospital to see the plaintiff and I pinpoint this occasion to late 1976 or early 1977 as that was the occasion when the plaintiff is purported to have given a detailed statement of his accident to DW2. The third occasion was when he collected RM30 from DW2 which he later handed to the plaintiff. Apart from the first visit, DW2 denied any knowledge of the subsequent visits after 27 May 1976 but it is in respect of the third visit that I now take issue as my consideration of the second visit is discussed further on in this judgment.

Following PW5's evidence, the plaintiff had confessed to him that he was in dire need of cash and had asked PW5 to get it from the defendant. Although the plaintiff asked for only RM50, the impression I get is that the amount was to be treated as an advance to the compensation that the plaintiff hoped to get from his civil claim. That being so, the plaintiff must be thinking of something more substantial, not a mere pittance of RM50. He had already suffered severe injuries which had left him completely paralysed and he must know that if he was successful in his claim, he would get a substantial sum by way of compensation. Thus to suggest that RM50 would be sufficient to tide over his financial needs then or that he was happy with a contribution of RM30 does not appear to stand to reason especially when he now claims a sum well in excess of RM50,000 by way of special damages alone. There was also no reason why DW2 should expend any money to the plaintiff and if indeed the plaintiff did receive RM30, it must have come from PW5 personally as an expression of his gratitude for having secured a "client". As a witness, PW5 appears evasive and unsure of himself and although I am aware that he was testifying to events that happened 8 years ago where details can easily be forgotten, there is still his demeanour in the witness-box which made me conclude that on the whole, I cannot accept his evidence totally.

Going away from PW5's evidence, I now consider the reasons given by the plaintiff why he had failed to respond to AB1 and D18. He maintains that there was no necessity for him to see the defendant personally to narrate details of the accident as he had already given a full and detailed statement to DW2. In this respect, he testified that he saw DW2 on 3 occasions, the first time on 27 May 1976 when he gave his written consent for the medical report, the second time in late December 1976 or early 1977 when PW5 brought DW2 specially to see him to record the statement and the third time when DW2 read back the statement to him and he, the plaintiff verified the correctness of its content. DW2 admitted meeting the plaintiff only once on 27 May 1976 where in addition to obtaining the written consent for the medical report the plaintiff had also given him his identity card number and his hospital admission number. At that meeting, DW2 had also informed the plaintiff that he should see the defendant as soon as possible for his statement to be recorded by the defendant personally. The plaintiff had responded by assuring him that he will be able to do so as he would be supplied with a wheel chair soon. DW2 emphatically denied taking any detailed statement of the accident from the plaintiff.

Of these two testimonies, I am more inclined to accept DW2's version as it is most unlikely that a lawyer's clerk with no basic legal training like DW2 whose main duties appear to be running errands and doing the more mundane and routine administrative functions, would be entrusted with the task of enlisting information from a prospective client upon which a solicitor will act to guide him in giving the proper advice to his client. Moreover, as I have already shown above, the plaintiff has not been very truthful in his dealings with the defendant. To begin with, he did not on the very first occasion, when PW5 saw him disclose the fact that he had already retained Mr. Fernandez. He had also concealed D17 from the defendant for reasons which can hardly be described as honest. Even assuming for one moment that he did give a statement to DW2, his better judgment should have prompted him to pursue the matter further by reminding the defendant of the progress of this case. But he did nothing positive and allowed time to catch on. While appreciating that his injuries had left him completely dependent on others, he could at least turn to his wife who visited him daily at the hospital, who is English speaking and was then working at the Hong Kong and Shanghai Bank. He could easily have asked her to telephone the defendant to enquire about his case but he did not. The inactivity on his part can only mean that since the receipt of D17, he knew all along that his case was a completely hopeless one and it also lends weight to the defendant's contention that after September 1976 after he had been handed

AB6, the plaintiff no longer regarded the defendant as his Counsel as he had already reverted to Mr. Fernandez. Again it was also possible for the plaintiff to have told DW2 that he could bring himself to see the defendant personally as he admitted that he was provided with a wheel chair in 1975 although he could only use it fully in 1977.

Finally I come to the plaintiff's accident itself and whether on the facts disclosed, any remedy is available to the plaintiff. The police had classified it as another case of a motor cyclist falling on his own into a drain and it is not disputed there is no other documentary evidence apart from D17, the first information report relayed by a crew number of Bravo 120 who found the plaintiff and his motor cycle lying in the drain after the accident. The plaintiff never lodged any police report or gave any statement to the police although he had every opportunity to do so. He has, a close friend, PW3, a Police Sergeant, whose office at the material time was opposite the Traffic Branch. Despite having been brought into hospital by the police, the plaintiff never complained to PW3 that none of the crew members of Bravo 120 had questioned him over the accident and neither did PW3, on his own initiative, enquire whether any police investigations had taken place even after having seen the plaintiff's wrecked motor cycle in the police store. I also find the plaintiff's recollection of the accident vague and unsure. He had seen the lights of a vehicle approaching from behind him and just as this unidentified vehicle was about to overtake him, he heard a bang and lost consciousness straightaway. He did not identify whether the noise of the bang came from the collision of the vehicle hitting any part of his motor cycle from the rear or whether it came from the sound of his motor cycle hitting the drain. As there were no police investigations, his motor cycle was never examined by the Registrar and Inspector of Motor Vehicles and apart from PW3's evidence as to the extent of the damages found on the motor cycle, there were no photographs taken to support PW3's evidence or any evidence offered to show what had happened to the motor cycle. PW3 was one of the first persons the plaintiff spoke to upon regaining consciousness in hospital and to him the plaintiff is alleged to have disclosed that an unidentified vehicle knocked him from the rear and during that visit to the hospital, PW3 spent 1 hour chatting with the plaintiff. The plaintiff, in evidence, however, painted a very different picture of the state he was in after he regained consciousness. Because of his injuries, he could barely move, he was strapped to his bed, he was not allowed a pillow and to borrow his own expression, he "could not only move his eyeballs". This picture of the helpless and pathetic plaintiff is completely different from the amiable and talkative plaintiff drawn by PW3. In the light of such evidence and particularly in the light of the police evidence that no other party is involved in this accident, no Court of Law what more the Bureau would entertain any claim for damages from the plaintiff.

From the evidence and circumstances surrounding this case, the defandant had done all that was expected of him during the period 27 May 1976 to the middle of September 1976 when he was handling the plaintiff's matter. As I have already pointed out there could not possibly be any contract pertaining to a true relationship of a solicitor and client existing between them during this period. The defendant was never retained by the plaintiff and at most, I describe their short relationship as being a step towards that direction and no more. For the various reasons that I have given above, the plaintiff has not succeeded in proving the defendant liable in negligence for failing to act on his instructions and I accordingly dismiss this action with costs.

Also found at [1984] 2 CLJ 113